EMPLOYMENT TRIBUNALS

Claimant: Mrs L Parkinson

Respondent: Training 2000 Limited

HELD AT: Manchester **ON:** 18th August 2017

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Mr R Carter Counsel
Respondent: Mr L Amartey Counsel

RESERVED JUDGMENT ON REMEDY

The judgment of the Tribunal is that: the claimant is awarded and the respondent ordered to pay as compensation for unfair dismissal £13,447.85

REASONS

1. The claimant's claim in respect of unfair dismissal in relation to her redundancy succeeded and the reasons for that were set out in a Judgment sent to the parties on 14th June 2017.

Relevant Findings of Fact

2. The claimant was dismissed on 21st August 2015 but was paid her notice pay and therefore her losses begin from 1st October 2016, she began work on the 27th June 2017 earning more than she had with the respondent, a total of 38 weeks and 4 days. The loss period is now agreed between the parties.

3. The net earnings of the claimant was not agreed as the only payslip available was the last payslip of the claimant and the respondents representative was concerned this did not represent an accurate picture of the claimant's average earnings, however no other payslips were produced by the respondents who would have been fully able to do so and therefore it seems entirely reasonable to rely on that last pay slip. This showed a net pay of £1,278.05 per month however during discussion at the Tribunal it was clear that this included a £200 deduction for the Christmas Club, a saving system operated by the respondent which clearly it would not be necessarily a factor relevant to the calculation of the claimant's weekly net salary Accordingly using the net pay minus the Christmas Club contribution we find that the claimant's net pay was properly £341.09 per week.

4. The claimant only claims compensatory loss as her basic award was met in the redundancy payment she received at the time of her termination. Therefore if she was awarded her full losses of 38 and 2/5ths of a week this would amount to £13,097.85.

5. The claimant also claimed £500 for loss of statutory rights.

Respondent's Submissions

6.

(i) The respondents submitted that a Human Resources Manager unconnected with the claim ,Ms Mallen, had recalculated the scores of the claimant and as a result she was joint third in receipt of 18/20 points and that therefore she had a third chance of being selected for redundancy. (the respondent based the points in summary on an increase of 2 re professional relationshios and a decrease of 2 in qualifications)

(ii) The respondent also submitted that the claimant was off sick at the date of her dismissal, that the Tribunal should find she would have carried on being off sick and therefore her losses should be calculated on the basis of her remaining sick pay entitlement which would only have been a further 19 days.

(iii) The respondent argued that the claimant would have been dismissed for capability by 20th April 2016.

(iv) That the claimant's failure to mitigate by applying for the internal tutor role, they accepted she had mitigated in respect of external roles.

(v) In respect of loss of statutory rights the respondent stated the claimant should only receive £350.

(vi) Other costs the claimant had claimed it was now agreed were not pursuable under a compensatory award.

(vi) In respect of fees, given that these had now been found unlawful they could not be awarded in favour of the claimant.

Internal Tutor Role

7. We understood from the respondent's representative at the beginning of the hearing that the issue regarding the Internal Tutor Role was not pursued. At the end of the case when submissions were made on this issue by the respondent it became clear this was a reference only to external roles for which they had received documentation and they were satisfied the claimant had mitigated, and not for the internal role. However the understanding of the panel and of the claimant's representative was that the internal tutor argument was not pursued hence he had not cross examined in respect of the internal role, nor made submissions nor considered that the claimant should give evidence regarding this point.

The claimant's submissions

8. The claimant submitted that it was understood that the issue regarding the Internal Tutor Role was withdrawn and therefore whilst the respondent's witness was asked no questions about it it would be unfair to allow the respondent to pursue it now given that the Tribunal had also shared this misconception, the comments he could make were that the respondent after the claimant's employment had been terminated did not have this job brought to her attention, again as it was still vacant at the time her employment was terminated. The claimant had given evidence that she could not access the intranet. The respondent agreed it had not been brought to her attention after her termination.

9. Regarding Ms Mallen's evidence on the rescoring it was submitted there was considerable doubt over it. The claimant had been marked down on qualifications from her original score and yet it appears that she did have clearly one additional qualification which was required out of the four and there was also doubt as to which were the two qualifications she did have as this had not been specified by Ms Mallen on her documentation. Further, it was highly likely that as a qualified Teacher with some years of experience the fourth qualification was considered as met by the claimant as it was superior to the qualification required. In addition Ms Mallen had not spoken to the original HR scorer to ascertain whether this was the approach he or she had taken at the time. Whilst it could be said that these considerations might apply to the other individuals whose scoring for qualifications was reduced we were here to discuss the claimant's potential rescoring and no evidence had been provided regarding the other individuals.

10. In respect of whether the claimant's illness was due to her dismissal or whether it preceded her dismissal and therefore could not be taken into consideration (the Johnson exclusion zone) the references in the medical notes showed that the illness continued because of the dismissal.

Findings of Fact

11. We heard evidence in this case from Sarah Mallen who rescored the claimant's claim form. In the initial scoring exercise all employees were scored on their corporate values and behaviour marked against six criteria, team working, adapting to change, professional working relationships, capability, sickness absence and qualifications. There were four potential scores, 5 - outstanding, 3 - good, 1 - requires improvement and 0 - inadequate. Maximum scores were 30 and the

claimant obtained 18 with the next two bottom people receiving 20. She received 1 point for professional working relationships and 1 point for capability.

12. We found that the professional conduct assessment was overly subjective and unfair due to issues regarding the incidents of swearing, over involvement with learners, unauthorised taking of TOIL, file throwing, under playing in the claimant's good feedback.

13. In respect of capability we found that the respondent could not substantiate some of their claims and there were significant queries regarding the evidence they provided, in respect in particular of late reviews as an email on 16th March 2015 had shown one of the claimant's comparators Dawn Taylor with 17 outstanding late reviews but later the document relied upon showed that Dawn Taylor had none, so although we felt there was sufficient objectivity to the criteria and sufficient concern in other areas of capability to accept the claimant's overall score we were still concerned about the unreliability of the evidence.

14. Ms Mallen in the light of the fact that the Tribunal's criticisms focussed on professional relationship increased the claimant's score to 3 and left capability at 1

15. However in addition Ms Mallen looked at the qualification and sickness scores of all the individuals. None of the sickness scores had altered. Looking at qualifications (not covered in the witness statement) Ms Mallen looked at the original qualification criteria which was that the following required IAG Level 3 (Information Advice and Guidance), Adult Literacy and Numeracy at Level 2 and IOSH Managing Safely. The standard required for the marks were : achieves expectations = 5; below expections = 3;unsatisfactory = 1.

16. In relation to the qualification scores all members of the pool had received 5 points. When this was re-scored all but Sharon Williams had reduced scores, Helen Bell because there was no IAG qualification evidenced, Sonia Colley because no IOSH qualification evidenced, Dawn Taylor because there was no numeracy and literacy qualifications evidenced, Louise Parkinson "has two of the four qualifications listed so downgraded from 5 to 3", Mel Thistlethwaite was downgraded to 3 from 5 as IAG Level 4 only evidenced. However there was no discussion of whether a 3 was appropriate or a 1 in her case.

17. This re-scoring engendered a number of questions, in particular we were concerned that the two of the four qualifications the claimant was said not to have were not actually specified whereas in every other case the qualification which was not evidenced was specified.

18. The claimant produced her application form for the Functional Skills job that she applied for before she was made redundant, (in respect of which she was unsuccessful) which showed that she had a degree in Applied Social Science from Lancaster University, a PGCE for Secondary/FE from UCLAN, Level 2 Maths and English NLTG, Health and Safety training from Training 2000, IOSH from Training 2000, Data Protection from Training 2000, Manual Handling and Assessor A1 Training 2000. She stated in her statement that she had ten years experience as a College Lecturer and had taught for Training 2000 since 2006.

19. Ms Mallen addressed the internal roles and referred to the application form of the successful candidate for the second job, who as it transpired ended up working in Blackpool and in fact lived in Fleetwood. His application form referred to him having seen the job role on Indeed, a very comprehensive job vacancy online resource and that he had applied for the job on 25th August which was after the claimant's dismissal. As said earlier the respondent agreed they had never brought the fact the role was still vacant to the claimant's attention again after the termination, although it was referred to in her final consulation meeting immediately prior to the termination.

20. The respondent stated that Christopher McKie's job offer as we saw in the last hearing required him to work at either Blackburn or Blackpool but as Mr Corner was able to work in Blackpool this meant that Mr McKie could stay in Blackburn. However again as we have noted it appeared Mr McKie was working in Blackburn on his appointment. This was of some relevance as the claimant stated she could not work in Blackpool due to her child care issues and that she had assumed Mr McKie had been appointed to Blackburn as that was where he had stationed himself. This was a reasonable assumption at the time. In addition she said she did not want to work alongside John Westhead, the respondent stated this was an unreasonable reason for not applying for the role, the claimant felt very upset due to some of the comments made in her redundancy assessment. The respondent also maintained that day to day interaction would be minimal however we do not accept that.

21. Regarding sickness absence, the respondents pointed out that under their sickness absence policy the claimant was entitled to eight weeks or forty days company sick pay in any rolling twelve months. She had been absent from work for twenty one days as a result of sickness and therefore up to the 20th April 2016 she would have been entitled to company sick pay for a further nineteen days, a sum of £1,620.55, following which she would have received statutory sick pay for a further nineteen weeks and four days, a payment of £1,715.52 up to the 10th January 2016 and following 20th April 2016 the claimant would not have been entitled to any further remuneration. Ms Mallen stated that given that the claimant continued to be sick it is likely she would have been dismissed on the grounds of capability before 20th April 2016.

22. The sickness absence procedure was produced to the Tribunal but there was no particular length of time referred to in this procedure or any particular sequence of meetings referred to, simply said "if a return to work is not possible within a reasonable time frame according to occupational health department advice which has been obtained then an employment capability review meeting will be convened with the employee, line manager and HR Department,". The employee could appeal against the outcome of any meeting if termination was recommended.

23. Although we did not have the claimant's full mitigation documents we had some evidence that she had applied for jobs in October and November and December 2015.

24. The claimant produced her medical records, she produced her records from GP visits, from 26th March 2015 to 7th April 2016. The claimant provided two

mental health reports from a Dr Imran Farooq and it is pointed out by the respondent that in one of these dated 9th March it was reported as follows:

> "she stated she felt low since December after she was made redundant from work but she said its not actually that that's causing the problems as she has dealt with a lot worse than this in the past for example her son going to Prison, her mother's mental health problems, her stepfather dying at age 45 and dealing with ten miscarriages".

25. There was also some discussion about whether the claimant might actually have Bipolar Disorder. A report of 1st April 2016 stated that the claimant had been for a job interview on 21st Mach, unfortunately she was unsuccesful:

> "She is still applying for jobs as she says she needs to work as she is going nuts at home".

26. Clearly the claimant was applying for jobs throughout a period when she was reporting as distressed and depressed to the medical services. On 5th May the claimant also saw the doctor and stated that she had failed to get another job which had upset her as she thought the interview went well, she had disclosed to them that she had a mental illness (presumably a reference to Bipolar) and regrets this, she says she feels low and useless as she has no job. She is not sleeping well and her sleep is broken. She feels she needs to work, she feels being at home is not helping her mental health and she will carry on applying for a job.

27. In terms of her GP's notes she had reported low mood on 9th May and the doctor had noted that she had had a recent miscarriage, 29th July she stated that she had low mood," lots going on at work, on list for redundancy and had accusations about work practice." On 20th August it was stated that she was not fit for work, the fit note diagnosed as low mood, duration 20th August to 3rd September, her history stated "has work redundancy meeting tomorrow, expects to be made redundant however required MED 3 (a fit note) in case a different outcome, seeing a Counsellor, on Fluorixide and depending on outcome will book follow up appointment with Denise who has been providing support".

The Law

28. In respect of a compensatory award Section 123 of the Employment Rights Act 1996 states that "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. Losses must flow from the unfair dismissal.

29. The respondent relied on the principle established by Polkey -v- A E Dayton Services Limited 1988 House of Lords in which it was established that where a dismissal is held to be unfair, purely on procedural grounds compensation can be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed.

30. It is now accepted that this principle applies to substantive unfair dismissals as well as procedural unfair dismissals, although it may be easier to determine the outcome in respect of a procedural dismissal where, for example, this may have only delayed an inevitable decision by a few weeks in the sense that the amount of time which would have been taken to correct the original procedural defect where it was, for example, failure to consult.

31. It is also accepted that it is a speculative exercise. In Software 2000 Limited -v- Andrews EAT 2007 the authorities were reviewed and following guidance given:-

(i) in assessing compensation for unfair dismissal the Tribunal must assess the loss flowing from that dismissal which would normally involve an assessment of how long the employee would have been employed but for the dismissal.

(ii) If it is contended an employee would or might have ceased to be employed in any event had fair procedures been adopted the Tribunal must have regard to all relevant evidence including any evidence from the employee.

(iii) there will be circumstances where the nature of the evidence is so unreliable the Tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made.

(iv) however the Tribunal must recognise it should have regard to any material reliable evidence that might assist it in fixing the just and equitable compensation and accept a degree of uncertainty is an inevitable feature of the exercise.

(v) a finding that an employee with continued employment indefinitely on the same terms should only be made where the evidence to the contrary is so scant that it can effectively be ignored.

32. The respondent drew our attention to the case of Hill -v- Governing Body of Great Tey Primary School 2013 EAT where Langstaff P stated "first the assessment of it is predictive, could the employer fairly have dismissed and if so, what were the chances that the employer would have done so. The chances may be at the extreme (certainly that it would have been dismissed or certainly it would not) so more usual for someone a spectrum between the two extremes. This is to recognise the uncertainties, a Tribunal is not called upon to decide the question on balance, it is not asking the question what it would have done if it were the employer it is assessing the chances of what another person, the actual employer, would have done. The Tribunal has to consider what a hypothetical fair employer but has to assess the actions of the employer before the Tribunal on the assumption the employer would this time have acted fairly though it did not do so beforehand.

33. In Britool Limited -v- Robinson and Others 1993 EAT the EAT said the burden of proving the employee would have been dismissed in any event was on the employer as long as the employee has put forward an arguable case that he or she would have been retained, were it not for the unfair procedure. In this case for

example the employer could and has adduced evidence of a fair procedure which they say would have equally led to the employee's dismissal or a third chance of dismissal.

Conclusions

Sick pay/capability dismissal

34. Would the claimant have continued to be off sick had she not been dismissed. This question goes to the heart of whether the claimant can only claim sick pay and/or whether she would have been dismissed anyway by the 20th April, some two months before she got an alternative job. We do not accept the respondent's contentions in relation to this, from the evidence presented we accept that the principle cause of the claimant's continuing to be sick was her dismissal. We find that the claimant, had she not been made redundant would have taken the time to recover from the shock of being in the process and had she not been chosen would have recovered from this shock relatively quickly within the 19 days left to her, we say this because the claimant had proved extremely resilient before as she had returned after a miscarriage and after seeing the other details of her mental health and personal difficulties it appears that she was a very resilient individual.

35. In the March 9th report where she said it was not actually thati.e. the redundancy selection that was causing the problem we think this is balanced by the many other comments made where she said that the inability to work was contributing to her feeling of low mood and inability to recover from it.

Tutor Role

36. We have taken into account the fact that the panel and the claimant's representative understood that the internal tutor role was not an issue and therefore there was no questioning of the witness in respect of this matter. The original reason why the claimant did not apply for these jobs was partly because she thought the Blackburn job had been given to Chris McKie and clearly there was evidence to suggest that at the time,(albeit his job description said Blackburn and Blackpool). Also that she did not want to work with John Westhead after the negative comments he had made about her in the redundancy exercise. We find that this was a reasonable position for the claimant to take as we found the assessments for the redundancy process were very unbalanced and that Mr Westhead could have expressed his criticisms of the claimant more objectively.

Would the claimant have been dismissed anyway if the respondents had properly assessed the claimant's competencies (Polkey)

37. The respondent relied on Ms Mallen's evidence of this to state that the claimant would have had the same points as Dawn Taylor and Mel Thistlethwaite and therefore she had a one in three chance of being made redundant.

38. We do not accept this for the following reasons:

(i) because Ms Mallen did not specify the two qualifications that she believed the claimant did not have and was unable to do so under cross

examination. This contrasted with her specifying the qualifications the others did not have.

(ii) that we could not have confidence in the accuracy of her search given that the claimant appeared to have three of the qualifications so that possibly the IOSH qualification had been overlooked or was not properly recorded amongst the respondent's records.

(iii) that the claimant appeared to have far superior qualifications to the IAG Level 3 with the PGCE Degree and years of teaching therefore we do not accept that the claimant's qualifications should have been reduced by two points. Whilst we can see that there would be an argument this makes no difference as her competitors were also marked down by two points and may equally have been wrongly marked down, we have no evidence regarding whether they had been wrongly marked down whereas we found we had enough evidence to conclude the claimant had been wrongly marked down.

39. Accordingly with the increase in the claimant's marks for professional relationships the claimant would have had two more points than Dawn Taylor and Mel Thisthlewaite.

40. In addition it seemed not a relevant process to only reassess all the candidates in respect of sickness absence and qualifications rather than every single criteria, particularly in relation to Dawn Taylor and Mel Thistlethwaite who were the claimant's nearest scorers. Had a more rigorous and analytical process been used in the first place it is possible they may not have scored so highly themselves in other areas. In addition of course a double marking system for everybody may well have made the system fairer as we found in the original decision the only marks which were checked were the claimant's, although we were not convinced following the hearing that this had actually taken place as we had no evidence from the HR Manager who was said to have done this.

Summary

41. Accordingly we find that the respondents has not satisfied us that the claimant would have been made redundant in any way or at the very least have had a third chance of being made redundant and as a result the claimant is entitled to her losses from the end of her notice period to the beginning of her new employment, a sum of £13,097.85, calculated on the basis of the last pay slip giving a weekly net wage of £341.09 and multiplying this by 38.4.

Statutory Rights

42. In respect of statutory rights we award the claimant £350 which is the standard amount. Whilst there is an argument that this amount should be doubled to reflect the fact that employees now have to work two years before acquiring employment rights in respect of unfair dismissal we are not convinced this is necessary in this case.

Summary

43. Accordingly we award the claimant £13,447.85.

44. If we are wrong in respect of not reducing the claimant's award by a third we note that the award in respect of two thirds of £13,097.85 would be £8,731.90, with the addition of the statutory rights this would be a alternative total of £9,081.90.

Fees

45. We reserve the claimant's right to apply for her fees for a period of three months from today renewable on the provision of cogent reasons if it transpires that the claimant has difficulty obtaining the fees from the fees refund process which has not yet been set up.

Employment Judge Feeney

Date 25th August 2017

RESERVED JUDGMENT AND REASONS SENT
TO THE PARTIES ON
13 September 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2401193/2016

Name of case: Mrs L Parkinson v Training 2000 Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 13 September 2017

"the calculation day" is: 14 September 2017

"the stipulated rate of interest" is: 8%

MR S ARTINGSTALL
For the Employment Tribunal Office